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Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Amendment of Section 73.202(b),	)	MB Docket No. 02-266
Table of Allotments,	)	RM-10557
FM Broadcast Stations.	)	
(Chillicothe, Dublin, Hillsboro and	)	
Marion, Ohio)	)	
	)	

TO: Assistant Chief, Audio Division
Media Bureau

RESPONSE OF THE COMMITTEE FOR COMPETITIVE COLUMBUS RADIO TO SUPPLEMENT OF CITICASTERS

The Committee for Competitive Columbus Radio (the "Committee"), by its attorney, hereby respectfully responds to the Supplement of Citicasters, filed in this proceeding under date of September 5, 2003, by Citicasters Licenses, Inc. ("Citicasters"). In response thereto, it is alleged:

1. In its Supplement, Citicasters admits that under the new multiple ownership rules it cannot acquire an FM broadcast station in the Columbus market. However, it argues that the rules have been stayed, so that this proceeding must be processed under the old rules; that the issue of compliance with the multiple ownership rules is in any event an issue to be decided at the time when an implementing application is filed and may not be considered as part of the rule making; that it and its parent company, Clear Channel, have the option of pledging to divest radio stations, if necessary, in order to comply with the rules; and that the new rules cannot be applied to Clear Channel, anyway,

because doing so would amount to an impermissible, retroactive application of a rule. Each of these points will be addressed, *infra*, *seriatum*.

2. The existence of the stay issued by the Third Circuit in the matter of *Prometheus Radio Project v FCC* is a red herring. The proceedings in the Third Circuit dealt almost entirely with television; nobody argued that the radio portions of the rules, which are more restrictive than the old rules, should be overturned. There is no legislation pending in the Congress which has any chance for success which would overturn or set aside the radio portions of the rules. Consequently, the portion of the rules providing for a redefinition of the Columbus market, which would preclude Clear Channel from acquiring an 8th station in that market, is most unlikely to be overturned.

3. On September 10, 2003, the FCC issued a Public Notice (DA 03-2867), announcing that for the time being it was suspending the new rules and going back to the old ones. This, however, is likely to be temporary; sooner or later the new rules will almost certainly go into effect for radio.

4. True, Citicasters argues that because it filed its rule making prior to the adoption of the new rules the new rules cannot be applied to Citicasters. It cites two cases for that proposition: *Bowen v. Georgetown University Hosptial,* 488 U.S. 204 (1988); and *Celtronix Telemetry, Inc. V. FCC*, 272 F.3d 585 (D.C. Cir. 2001). Neither of these cases is in point. *Bowen* involved a situation in which a tax or assessment had been imposed and an agency sought to increase the amount of the assessment retroactively. *Celtronix* involved a change in the FCC's rules governing grace periods for late installment payments on IVDS licenses. The Court of Appeals actually ruled that the change was not impermissibly retroactive and affirmed the order of the Commission in all respects.

5. A case which is much more in point and which Citicasters did not cite is *Sinclair Broadcast Group, Inc.*, 284 F. 3d 148, 350 U.S. App. D.C. 313 (2002). There, the Commission had a rule allowing local marketing agreements ("LMAs") between television stations which were not considered attributable under the local ownership rule. The FCC changed the rule to make the LMAs attributable and, in some instances, illegal. It did not grandfather the existing LMAs and, accordingly, the potential existed for those LMAs to be dissolved. The appellant, Sinclair, argued that this amounted to an impermissible, retroactive application of the rule. The Court of Appeals disagreed, stating as follows:

> "Sinclair's contention that the LMA grandfathering provision constitutes impermissibly retroactive rulemaking also fails. The *Local Ownership Order* alters the future effect, not the past legal consequences of LMAs. *See, Celtronix Telemetry, Inc. v. FCC*, 272 F.3d 585, 588 (D.C. Cir. 2001). The rule does not either alter the past legality of LMAs or impose any liability for having engaged in LMAs that now constitute an impermissible duopoly or introduce any retrospective duties for past conduct. *See DIRECTV, Inc. v. FCC*, 110 F.3d 816, 825-26 (D.C. Cir. 1997); *Buckeye Cablevision, Inc. v. FCC*, 387 F.2d 220, 227-28 (D.C. Cir. 1967). At most the *Local Ownership Order* is secondarily retroactive in upsetting expectations at the time the LMAs were entered into. *See Bowen v. Georgetown University Hospital*, 488 U.S. 204, 219, 109 S.Ct. 468, 477, 102 L.Ed.2d 493 (1988) (Scalia, J., concurring). In this regard, the only question is whether the Commission's action was reasonable. *See Bergerco Canada v. U.S.*, 129 F.3d 189, 192-93 (D.C. Cir. 1997). Because the Commission's grandfathering decision was consistent with the 1996 Act and fulfills the public interest in diversity, Sinclair fails to demonstrate that the Commission's decision is unreasonable and not a permissible change of policy notwithstanding that it may upset some expectations." 284 F.3d 148 at p. 166.

Here, as in *Sinclair*, the adoption of new rules may "upset [Clear Channel's] expectations" of owning an 8th station in Columbus, but that does not mean that the rules will be retroactive; they will apply only to Clear Channel's future ability to acquire that station.

6. Turning now to Citicasters' argument that compliance with the multiple ownership rule may not be considered in a rule making proceeding, Citicasters only partially quotes from the *Detroit Lakes, et al* , decision at 17 FCC Rcd 25055 (All. Br. 2002). The full quote reads as follows:

> "We also reject the Triad Broadcasting argument that the proposal to reallot Channel 236C1 to Barnesville should not be entertained because it would contravene our multiple ownership requirements as set forth in Section 73.3555 of the Rules. At the outset, at the modified reference site discussed earlier, there will no longer be overlap of the 70 dBu contours of Station KRVI and commonly owned Station KDAM (formerly KCHY), Hope, North Dakota. In any event, a rulemaking proceeding involves a technical and demographic analysis of competing proposals in the context of Section 307(b) of the Act. In order to achieve an efficient and orderly transaction of both the rulemaking process and the subsequent application process, any issue with respect to compliance with Section 73.3555 of the Rules will be considered in connection with the application to implement this reallotment." 17 FCC Rcd 25055 at p. 25060.

Thus, in *Detroit Lakes*, the FCC staff knew that there was a modified reference point which would enable the proponent to comply with the multiple ownership rules, *i.e.*, that the staff was not wasting its time.

7. Similarly, in *Copeland, Kansas*, 11 FCC Rcd 497 (All. Br. 1996), the proponent of the rule making had made a flat statement that it was eligible to acquire another station in the market, and had submitted an engineering showing to that effect. The showing was incomplete, so the staff granted the rule making on the assumption that it would be completed at the application stage. Only in *Chatom and Grove Hill, Alabama*, 12 FCC Rcd 7664 (All. Br. 1997) does there appear to have been a conflict with the multiple ownership rules, requiring a possible divestiture. There, the FCC staff warned the proponent of the possible problem in the Notice of Proposed Rule Making. The proponent pressed ahead anyway, so that the staff could reasonably conclude that it

was not wasting precious staff resources.

8. Here, Citicasters says that at the application stage Clear Channel will have the "option" to commit to divesting stations. However, it does not make a divestiture commitment. It says it does not have to because of retroactive rule making argument - an argument which we have shown to be fatally flawed. Therefore, the staff may well be wasting its time processing this proposed rule making.

9. At paragraph 5 of its Supplement, Citicasters reiterates its myopic theory of the case. It claims that, because of the need to provide Dublin, Ohio, with a first local transmission service, all of the other deficiencies in its proposal are irrelevant. It overlooks the fact that, while Dublin may have certain needs for local transmission service, it has not been shown that those needs are not already served by the other 43 stations listed by BIA as serving the Columbus market. Citicasters also ignores priority number 4, "other public interest factors".

10. Even if it could be found that Dublin has needs which are not already served by the existing stations in the Columbus market, the proposed change of allotments does not serve the public interest. To the contrary, it reeks havoc. It strips the community of Marion, Ohio, an independent and thriving community of 35,318 persons, of one of its only three broadcast stations, leaving Marion with only an AM station and a 3 kW, Class A FM station. Furthermore, since both of these stations are owned by Clear Channel, it leaves Marion with no competitive local service (not that it has any now - Clear Channel owns every station in the town). Furthermore, it downgrades Station WSRW, Hillsboro, Ohio, from a Class B station to a Class A station, resulting in a substantial reduction in the area served by that station, and removes a second transmission service (and the only FM radio station) from Hillsboro, Ohio, a community of 6368 residents. Thus, far

from achieving a "preferential arrangement of allotments", the Citicasters' proposal simply creates mayhem, all for the purpose of moving a station to Dublin, a community which is already well served by the other stations in the Columbus Urbanized Area.

Respectfully submitted,

September 12, 2003

THE COMMITTEE FOR COMPETITIVE COLUMBUS RADIO

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CERTIFICATE OF SERVICE

I, Traci Maust, a secretary in the law office of Lauren A. Colby, do hereby certify that copies of the foregoing have been sent via first class, U.S. mail, postage prepaid, this 12th day of September, 2003, to the offices of the following:

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